

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of

Petition of Standing Rock Telecommunications, Inc.  
For Designation as an Eligible Telecommunications  
Carrier Pursuant to Section 214(e)(6) of the  
Telecommunications Act of 1996

WC Docket No. 09-197

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**COMMENTS OF THE CHEYENNE RIVER SIOUX TRIBE**  
**TELEPHONE AUTHORITY REGARDING STANDING ROCK**  
**TELECOMMUNICATIONS, INC.'S PETITION FOR RECONSIDERATION**  
**OF THE STANDING ROCK ETC DESIGNATION AND REDEFINITION ORDER**

The Cheyenne River Sioux Tribe Telephone Authority ("Telephone Authority") files the instant comments addressing the request for reconsideration filed by Standing Rock Telecommunications, Inc. ("SRTI") regarding portions of the Federal Communications Commission's ("Commission") *Memorandum Opinion and Order, Telecomms. Carriers Eligible for Universal Serv. Support; Standing Rock Telecomms., Inc. Petition for Designation as an Eligible Telecomms. Carrier; Petition of Standing Rock Telecomms., Inc. to Redefine Rural Service Areas*, WC Dkt. No. 09-197 (rel. Aug. 24, 2010) ("Standing Rock ETC Designation and Redefinition Order"). *See Petition for Reconsideration of Standing Rock Telecomms., Inc.*, WC Dkt. No. 09-197 (filed Sept. 23, 2010) ("SRTI Petition for Reconsideration"). The SRTI Petition for Reconsideration "argues that the definition of its service area should not be conditioned on the consent of the North Dakota Public Service Commission to redefine the service area of West River Telecommunications Cooperative, a rural telephone company." *Public Notice* at 1, *Comment Sought on Standing Rock Telecomms., Inc.'s Petition for Reconsideration of the Standing Rock*

*ETC Designation and Redefinition Order*, WC Dkt. No. 09-197 (Oct. 15, 2010). For the reasons set forth herein, the Telephone Authority supports SRTI's request.

**I. STATE PUBLIC UTILITIES COMMISSIONS  
LACK JURISDICTION OVER TRIBAL PROVIDERS  
WITHIN INDIAN RESERVATION BOUNDARIES**

**A. COMMISSION DESIGNATION OF TRIBAL ETCs OPERATING WITHIN INDIAN RESERVATION BOUNDARIES.**

State public utilities commissions do not have jurisdiction over tribal telecommunications agencies within the exterior boundaries of the Indian reservations they serve. In South Dakota, it is settled “that the State has no authority over tribal enterprises like the [Telephone Authority] conducting business on the Cheyenne River Indian Reservation.” *Memorandum Decision* at 12, *Cheyenne River Sioux Tribe Tel. Auth. v. Pub. Utils. Comm’n of S.D.*, Civ. No. 95-288 (S.D. Cir. Ct. Feb. 21, 1997), *aff’d*, 595 N.W.2d 604 (S.D. 1999) (“State Court Decision”).<sup>1</sup> Prior to its amendment in 1997, the Communications Act (codified as amended in scattered sections of 47 U.S.C.) required only that the state public utilities commissions designate eligible telecommunications carriers (“ETCs”). 47 U.S.C. § 214(e)(2). The state commissions, however, cannot designate tribal telecommunications services providers as ETCs within Indian reservation boundaries because they lack regulatory jurisdiction over tribal telecommunications operations

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<sup>1</sup> The Telephone Authority is a governmental entity created by the Cheyenne River Sioux Tribe (“Tribe”) by tribal ordinance. Cheyenne River Sioux Tribal Ordinance No. 24 (Sept. 10, 1974); State Court Decision at 8. The Telephone Authority is an ETC and the designated telecommunications services provider for various telephone exchanges in South Dakota. *See Findings of Fact, Conclusions of Law, Order and Notice of Entry of Order* at 5, *Filing by Cheyenne River Sioux Tribe Tel. Auth. for Designation as an Eligible Telecomms. Carrier*, No. TC97-184 (S.D. P.U.C. Dec. 18, 1997); Cheyenne River Sioux Tribe Resolution No. 337-97-CR (Nov. 5, 1997) (designating the Telephone Authority an ETC under tribal law); *Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 15 F.C.C.R. 12208, 12276 ¶ 149 (rel. June 30, 2000); *Petition of Standing Rock Telecomms., Inc. for Designation as an Eligible Telecomms. Carrier* at 17, WC Dkt. No. 09-197 (Dec. 18, 2009).

there. Thus, while 47 U.S.C. § 214(e) was not facially ambiguous, an extrinsic ambiguity arose with respect to tribal telecommunications services providers because the goal of the provision could not be satisfied through a literal reading of its language.

On December 1, 1997, Congress enacted Pub. L. No. 105-125, 111 Stat. 2540, which provides that the Commission must decide applications for ETC designation where state commissions do not have jurisdiction. The Communications Act, as amended, now provides that the Commission, upon request, must designate common carriers “not subject to the jurisdiction of a State commission” as ETCs. 47 U.S.C. § 214(e)(6). Following the 1997 amendment to the Communications Act, the Commission determined that “with regard to tribally-owned carriers providing service on tribal lands, state law is generally inapplicable when state commissions attempt to regulate the conduct of tribal members directly within the reservation boundaries, except in ‘exceptional circumstances.’” *Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 15 F.C.C.R. 12208, 12259 ¶ 102 (rel. June 30, 2000) (“Twelfth Report and Order”). Thus,

[w]ith regard to tribal lands . . . we recognize that a determination as to whether a state commission lacks jurisdiction over carriers serving tribal lands involves a legally complex and fact-specific inquiry, informed by principles of tribal sovereignty, federal Indian law, treaties, as well as state law. . . . In light of the unique federal trust relationship between the federal government and members of federally-recognized Indian tribes and the low penetration rates on tribal lands, we conclude that this Commission may make the threshold determination of which entity -- the state or this Commission -- has jurisdiction to make the eligibility designation of carriers providing service on tribal lands.

*Id.* at 12256 ¶ 95.

“The Act does not provide any guidance, however, on how to determine whether a state commission lacks jurisdiction, who makes the determination, or what to do if two entities (*e.g.*, a state and a tribe) both assert jurisdiction over the same telecommunications carrier.” *Memorandum Opinion and Order, W. Wireless Corp. Petition for Designation as an Eligible Telecomms. Carrier for the Pine Ridge Reservation in S.D.*, 16 F.C.C.R. 18145, 18146 ¶ 4 (2001). To fill in the gaps, therefore, the Commission established a procedure whereby a common carrier serving tribal lands may petition it for a determination on the jurisdictional question. *Id.* (citing Twelfth Report and Order, 15 F.C.C.R. at 12265 ¶¶ 115-27). Accordingly, the Commission, as opposed to a state commission, often designates tribally-owned common carriers as ETCs. *See, e.g., Order, Fed.-State Joint Bd. on Universal Serv.*, 22 F.C.C.R. 1866, 1870-71 ¶¶ 10-12 (2007) (where state commission did not assert jurisdiction, FCC assumed authority to designate tribally-owned common carrier as ETC within entire reservation and did so without differentiating between tribal members and non-tribal members); *Memorandum Opinion and Order, Designation of Fort Mojave Telecomms., Inc., Gila River Telecomm., Inc., San Carlos Telecomms., Inc., & Tohono O’Odham Util. Auth. as Eligible Telecomms. Carriers Pursuant to Section 214(e)(6) of the Commc’ns Act*, 13 F.C.C.R. 4547 ¶¶ 3-4 (1998) (same, but Commission did not state whether service areas mirror boundaries of Indian reservations); *Order, Fed.-State Joint Bd. on Universal Serv.*, 22 F.C.C.R. 2479, 2482-84 ¶¶ 9-13 (2007) (“Smith Bagley Order”) (where state commission did not assert jurisdiction over a non-tribally-owned carrier, Commission assumed jurisdiction over the carrier without regard to whether it served tribal members and/or non-tribal members).

**B. SERVICE AREA REDEFINITION FOR TRIBAL TELECOMMUNICATIONS SERVICES PROVIDERS SHOULD ALSO BE THE RESPONSIBILITY OF THE COMMISSION.**

In addition to requiring that the Commission designate ETCs where state public utilities commissions lack jurisdiction to do so, the Communications Act also requires that the Commission must designate ETC service areas “consistent with applicable Federal and State law.” 47 U.S.C. § 214(e)(6). The service area is generally a rural telephone company’s study area, “unless and until the Commission and the States” redefine it. *Id.* § 214(e)(5). The Commission’s regulations provide that if the Commission determines to redefine a service area, it must “seek the agreement of the state commission.” 47 C.F.R. § 54.207(d). However, when Congress amended the Communications Act in 1997, it also amended the first sentence of 47 U.S.C. § 214(e)(5) to make it consistent with the new § 214(e)(6) such that an ETC’s service area can alternatively be “established by . . . the Commission under paragraph 6.” Act of Dec. 1, 1997, Pub. L. No. 105-125, § 1(4), 111 Stat. 2540. The 1997 amendments to 47 U.S.C. § 214(e)(5) and (6) occurred several months after the Commission’s promulgation of 47 C.F.R. § 54.207(d) which regulation implemented the pre-amendment statute.

Consistent with the 1997 amendments to 47 U.S.C. § 214(e)(5) and (6), in the proceedings to determine whether Western Wireless Corporation satisfied the statutory and regulatory requirements for designation as an ETC to serve the Pine Ridge Indian Reservation, the Commission redefined the ETC’s service area to trace the boundaries of the Pine Ridge Reservation, excluding service to non-tribal members, and it did so without the state commission’s concurrence. *Memorandum Opinion and Order, Fed.-State Joint Bd. on Universal Serv.*, 16 F.C.C.R. 18133, 18139-40 ¶¶ 17-18 (2001) (“Western Wireless Order”); *accord* Smith Bagley

Order, 22 F.C.C.R. at 2488 ¶ 29 (Commission designated ETC's service area as the entire Navajo Reservation within the State of Utah without seeking the state commission's concurrence). The Commission specifically rejected the argument that it had to consult with the state public utilities commission prior to defining the ETC's service area:

We reject the contention of a few parties that the Commission must consult with the South Dakota Commission before designating Western Wireless as an ETC for a service area that differs from the rural telephone company's study area. We conclude that the federal-state process in section 214(e)(5) contemplates situations in which only one entity, either the state commission or this Commission, has the authority to designate the rural telephone company's entire study area as the ETC's service area.

Western Wireless Order, 16 F.C.C.R. at 18140 ¶ 18 (footnote omitted); *see also* SRTI Petition for Reconsideration at 3 (quoting Western Wireless Order, 16 F.C.C.R. at 18140 ¶ 18). The Commission reached this conclusion because, "we do not believe that Congress envisioned that the designating entity might need to involve another regulatory body, or seek its permission, before designating an ETC for a service area otherwise lying wholly within its jurisdiction." Western Wireless Order, 16 F.C.C.R. at 18140 ¶ 18. The Commission specifically noted that the regulation in 47 C.F.R. § 54.207 "was established prior to the adoption of section 214(e)(6) . . . [and, therefore,] did not contemplate the current situation in which the Commission, in the absence of state jurisdiction over a carrier, has a statutory obligation to be the sole designating entity under section 214(e)(6)." Western Wireless Order, 16 F.C.C.R. at 18140 ¶ 18 (footnotes omitted). As a result, the Commission alone designated the ETC's service area as the Pine Ridge Reservation which "differs from the study areas of three rural telephone companies . . . in as much as these study areas extend . . . beyond the boundaries of the Reservation." *Id.* at 18139 ¶ 17.

Even though the factual underpinnings of the SRTI request for ETC designation and the Western Wireless request for ETC designation mirror each other, the Western Wireless Order stands in stark contrast to the Standing Rock ETC Designation and Redefinition Order because the portion of the Standing Rock order redefining the incumbent service area specifically “is conditioned on the consent of the North Dakota Commission to redefine the service area of West River, a rural telephone company.” Standing Rock ETC Designation and Redefinition Order at 9 ¶ 25. This determination results in the precise untenable situation that the Commission expressly avoided by its ruling in the Western Wireless Order, namely, the involvement of more than one regulatory body in the redefinition of service areas. Under the Standing Rock ETC Designation and Redefinition Order, the Commission is the sole authority for designation of SRTI as an ETC, whereas both the Commission and the North Dakota Public Service Commission must weigh in on the redefinition of the incumbent’s service area. *Compare id.* at 6 ¶ 14, *with id.* at 9 ¶ 25. The Commission reached this result without attempting to distinguish the Western Wireless Order, and without any analysis of the congressional intent underlying the enactment of 47 U.S.C. § 214(e)(6). Yet, the Western Wireless Order is apposite here: SRTI seeks to provide telecommunications services entirely within the exterior boundaries of the Standing Rock Sioux Reservation, where the North Dakota Public Service Commission does not have jurisdiction to act. In order to adhere to its prior-established precedent regarding redefinition of service areas lying wholly or partially within the exterior boundaries of Indian reservations, and in order to uphold Congress’ intent in enacting 47 U.S.C. § 214(e)(6), the Commission should grant SRTI’s Petition for Reconsideration and revise the Standing Rock ETC Designation and Redefinition Order so that it follows the Western Wireless Order.

## II. CONCLUSION

For the reasons set forth herein, the Telephone Authority respectfully requests that the Commission grant the SRTI Petition for Reconsideration and make the determination whether to redefine West River's service area in North Dakota without the involvement or concurrence of the North Dakota Public Service Commission.

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15<sup>th</sup> day of November, 2010, a true and correct copy of the foregoing *Comments of the Cheyenne River Sioux Tribe Telephone Authority Regarding Standing Rock Telecommunications, Inc.'s Petition for Reconsideration of the Standing Rock ETC Designation and Redefinition Order* was served via electronic mail on the following:

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